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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 327

HOWARD ROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

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The following points are made in reply to respondent's brief in opposition to the Petition:

With Respect to Respondent's Statement of the Facts:

At page 4 of the respondent's brief, the following statement appears:

> "Kimball's books reflected both commissions to petitioner and the sale to Mueller" (R. 3221-3222).

This statement could be misleading. Kimball's books do not show that petitioner received a commission from the sale to Mueller nor do they in any other way connect petitioner with the sale or with Mueller. They merely show, in separate places, that petitioner was one of Kimball's many salesmen and that Mueller was one of its many customers.

In Reply to Point 1 of Respondent's Argument:

With respect to the Kelly testimony, the Government argues:

> "Since there was sufficient competent evidence to sustain the verdict it is immaterial that incompetent evidence on this point may have been admitted as well" *Leeby* v. *United States*, *supra*, 192 F. 2d at 335; *Diehl* v. *United States*, 98 F. 2d 545, 548 (C A 8, 1938).

The two cases cited by the respondent do not support its position. They make it clear that a criminal conviction may not rest upon incompetent evidence (such as the Kelly testimony) unless the other evidence supporting the conviction is "*abundant*" not merely "sufficient". In effect, the competent evidence must exist in such abundance as to exclude the possibility that the incompetent evidence was the persuasive factor in petitioner's conviction by the jury.

In the instant case the other evidence cited by respondent (p. 6) was neither abundant nor even sufficient. That petitioner worked for Kimball and made the "*type*" of call that Mueller received proved nothing. Kimball employed numerous salesmen who kept its telephones in constant use calling prospective customers. The alleged telephone call to Gairing was pure hearsay even as to Gairing and in addition was totally irrelevant as to Mueller in the absence of proof that petitioner was salesman number 24.

None of the cases cited by the Government on question of proof of telephone identity sustained a conviction based on such flimsy corroboration. In *United States* v. *Flemming*, 134 F. 2d, 776 (2nd Cir. 1943) the identity of the maker of a telephone call was corroborated by a return call. Such corroboration comes within a well established

rule and is to be sharply distinguished from the instant case where only one call was made, the alleged call which constituted the crime and there was no return call.

In *Jarvis* v. *United States*, 90 F. 2d 243 (1st Cir. 1937) the fact that a witness had repeatedly received sales literature from a particular securities firm prior to receiving a telephone call from a voice identifying himself as being with said firm, combined with the fact that no other firm was engaged in the sale of the securities in question, was held sufficient to prove that the call was made on behalf of the firm. It should be noted that the identity of the particular employee who called was not at issue.

Similarly, in *Van Riper* v. *United States*, F. 2d, 961 (2nd Cir. 1926) the fact that the firm in question was the only firm engaged in the sale of the securities taken together with the fact that the several telephone calls were made to and from the same office, was sufficient to identifying the firm as the source of the telephone calls, but the Court was very careful to point out:

> "Of course, this did not identify him [the telephone voice] *as the person whose name he gave;* indeed we may be substantially sure that he was *not* that person". (Emphasis added.)

The above observation is particularly applicable to the instant case, where it is not the firm but petitioner, one of its numerous employees, who is being charged with the crime of making the particular telephone call in question.

Robilio v. *United States*, 291 Fed. 985, and *Wallace* v. *United States*, 291 Fed. 972 (6th Cir., 1923), involved repeated telephone calls, return telephone calls and independent voice recognition. Accordingly, they cannot be considered authority for the Government's position herein where there was a single telephone call, no return calls and no voice recognition.

In *Andrews* v. *U. S.*, 78 F. 2d 274 (10th Cir. 1935) the telephone calls sought to be proved were corroborated by receipts and subsequent correspondence. In the instant case, no such written corroboration exists, unless petitioner is connected to the receipt issued Mueller by the incompetent Kelly testimony.

With respect to the admissibility of Kelly's testimony, respondent argues (p. 7) that

> "* * * it is not entirely clear that Kelly's testimony was incompetent. His testimony and that of the bookkeeper indicated that he was testifying to personal observation of a record kept in the ordinary course of business for the purpose of computing commissions;"

No record citation is given for this assertion. None can be given since there is no evidence that the list which Kelly said he saw was a record kept in the regular course of business. The absence of such evidence is doubly significant when it is considered that Kimball's bookkeeper, Mr. Sussman, and the books and records of the Kimball company were in Court.

The distinction drawn by respondent (p. 7) with respect to the best evidence rule between the "terms" of an instrument and the "information" it contains is neither clear nor supported by the cases cited. These cases hold merely that statements or events may be proved by the testimony of witnesses having direct knowledge thereof as well as by documents in which they may be recorded. Thus, in *United States* v. *White*, 223 F. 2d 674 (2d Cir. 1955) the Court permitted oral testimony as to defendant's confession when a wire recording thereof had been made. The theory of this decision was that the issue was not the content of the wire recording but what statements defendant in fact had made in his confession. Upon the

same theory, in *Meyers* v. *United States*, 171 F. 2d 800, 813 (D.C. Cir. 1948) testimony was admitted as to defendant's statements before a congressional committee, although a stenographic transcript of said proceedings was in existence. In a civil case, *Herzig* v. *Swift*, 146 F. 2d 444 (2d Cir. 1945) testimony was permitted as to the earnings of a partnership where the same were known to the witness although said earnings were also reflected in the partnership's books and records. A similar holding is *Malir* v. *Pulidicker Commercial Alcohol Co.*, 62 F. Supp. 161 (ED Pa. 1945) holding that a witness may testify as to his knowledge of wages paid an employee although said wages are also reflected in books and records.

None of the foregoing decisions apply. Here, Kelly had no knowledge of the salesmens' numbers except as shown on the alleged list. His testimony had to be of the content of the list. Indeed, the Court's disregard of the hearsay rule as to Kelly's testimony turns upon the essential (albeit erroneous) premise that such testimony constituted nothing more than the introduction of the list as a business record. Accordingly, the best evidence rule was clearly applicable.

Had Sussman, the bookkeeper, testified that petitioner was salesman number 24 either from his personal knowledge or by producing the list or had he even testified as to the authenticity of the list which Kelly said he saw, some merit might attach to the identification of petitioner as salesman number 24. But, although Sussman testified, he carefully did not speak on this issue, thereby giving the Kelly testimony a strange and hollow ring. As the record now stands, no person has sworn that he personally knew either that petitioner was salesman number 24 or that the records of the Kimball Company, duly kept and maintained, showed petitioner so to be. Yet it is on this fact that petitioner's conviction rests.

In Reply to Point 2 of Respondent's Argument:

Respondent's justification of the improper cross examination and the cases cited in support thereof, ignores the chief vice of the technique employed by the Government in cross examining petitioner. Assuming that it was proper to show a "course of conduct" in order to negate good faith, actual proof of such prior misconduct is required for this purpose. In each of the cases cited by respondent on page 8 of its brief; prior illegal acts were proven. In the instant case, there was no such proof. Instead, the prosecutor merely insinuated and suggested numerous prior crimes in connection with the sale of securities and then placed upon petitioner the burden of disproving all of these insinuations. This is directly opposed to the presumption of innocence which is supposed to prevail in our system of criminal justice.

In Reply to Point 3 of Respondent's Argument:

The Government argues that the "Swan-Finch" reference was not prejudicial and should be ignored because petitioner's trial counsel failed to object to it. As can be seen from the transcript in its original form, petitioner's counsel was confused by the reference, and advised the Court that he did not understand it. The trial judge took great pains not to enlighten him. Under the circumstances, we submit, counsel's failure to object is understandable.

None of the cases cited by respondent in support of the correction of the record, involved the striking of words appearing in a stenographic transcript and the substitution of other words to reflect the recollection of the judge and of the prosecutor. Each case cited by Respondent involved a situation where there was no stenographic transcript or

its content was ambiguous or an omission therefrom was alleged. It is submitted that the situation is entirely different where prejudicial remarks of prosecuting attorney are deleted from a transcript by the trial judge upon the application of the prosecutor after said remarks have been assigned as error on appeal.

Finally, we note the tendency of respondent to argue that each error was not *of itself* prejudicial. It is submitted that in view of the absence of any other corroborative evidence, the admission of the Kelly testimony was critical; that in the light of the lack of competent evidence of guilt of the crime charged in the indictment, the unproved insinuation of other crimes was poisonously effective, and that in the context of the criminal aura with which petitioner was unfairly painted by the prosecution, the suggestion that he was also implicated in the notorious Swan-Finch scandal sealed his fate with the jury. The cumulative effect of these errors renders the conviction unsupportable.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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